



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1638

Appeal PA-980174-1

Ministry of Natural Resources



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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was for access to all correspondence, memoranda or briefings related to the development of resource-based tourism policy process submitted by a named tourist organization, and all submissions made by this organization relating to the Lands for Life Round Table process. The Ministry notified the named organization (the third party) of the request, pursuant to section 28 of the Act. The named organization objected to disclosure of the responsive records.

The Ministry subsequently decided to grant partial access to the three letters found to be responsive to the request. The Ministry denied access to portions of one letter on the basis of sections 17(1) (third party information) and 21(1) (invasion of privacy) and granted access in full to the other two letters. The requester did not appeal the Ministry's decision to deny access to these parts of the record. Therefore, these portions of the record are not at issue in this appeal and I will not consider the application of sections 17(1) and 21(1) of the Act as they have been applied by the Ministry.

The third party appealed the Ministry's decision to grant access to the remaining records on the basis of the exemption in section 17(1) of the Act. In this order, I will refer to the third party as the appellant.

The records in this appeal are the following letters from the appellant to the Minister:

- a two-page letter dated September 19, 1996 (Record 1)
- a two-page letter dated October 10, 1996 (Record 2)
- the remaining portions of a nine-page letter dated October 10, 1996 (Record 3)

This office provided a Notice of Inquiry to the appellant, the requester and the Ministry. Representations were received from the appellant and the Ministry.

DISCUSSION:

THIRD PARTY INFORMATION

In its representations, the Ministry states that it supports the position taken by the appellant and that the appellant is best equipped to defend its position.

The appellant objects to the disclosure of the records on the basis that it could reasonably be expected to result in the harms described in sections 17(1)(a), (b) and (c). These sections of the Act read as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

For a record to qualify under one of the above sections, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

TYPE OF INFORMATION

The appellant submits that the records contain information that “could impact upon the commercial position of the tourism industry”. The appellant argues that the records address issues of concern to the industry in an attempt to obtain a favourable response which could result in improved commerce.

Previous orders of this agency have determined that commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term “commercial” information can apply to both profit-making enterprises and non-profit organizations and has equal application to both large and small enterprises (Order P-493). In addition, the information itself must be of a commercial nature (Order P-394). I agree with and adopt these definitions for the purpose of this appeal.

The records at issue consist of three letters from the appellant to the Ministry. I have carefully reviewed the records and I find that only a portion of page 3 of Record 3 contains information that can be properly characterized as commercial information. This information consists of the results of a survey undertaken by the appellant and relates to the buying and selling of specific tourist services within a specific market

segment. I find that this portion of the record, which I have highlighted in blue, satisfies the first part of the section 17(1) test.

I find that Records 1 and 2 and the remaining parts of Record 3 contain general information and detail the appellant's interest, advocacy and concerns regarding the tourist industry. I find this information cannot be characterized as "commercial" for the purposes of section 17 and does not meet the first part of the test. Since all three parts of the test must be met, these records do not qualify for exemption and should, therefore, be disclosed to the requester.

SUPPLIED IN CONFIDENCE

In order to meet the second part of the test, it must be established that the information was **supplied** to the Ministry and that it was supplied **in confidence**, either implicitly or explicitly. Previous orders of the Commissioner have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be determined that an expectation of confidentiality existed and that it had a reasonable basis (Order M-169).

The appellant submits that it has an interest in the tourist industry and in its capacity as representative and advocate, it enters into discussions and dialogue with the government. It provides information to the government and in doing so, is able to have some input into the Ministry policy and programs. It states that it provides this information implicitly in confidence and does not expect the Ministry to disclose it.

The Ministry supports the appellant's position and states that when the information is provided to the Ministry by the appellant and similar stakeholders, there is a reasonable expectation that it would not be released.

I accept the position of the appellant and find that the results of the survey that it shared with the Ministry was done implicitly in confidence and that the expectation of confidentiality had a reasonable basis. I find that the second part of the test has been met.

HARMS

The appellant submits that disclosure of the record could reasonably be expected to result in the harms described in sections 17(1)(a), (b) or (c).

I will first consider the application of section 17(1)(b).

The appellant submits that as a stakeholder, it is often consulted by the Ministry on proposed legislation, policy and regulatory matters on tourism-related issues. It states that the Ministry's ability to continue to receive such information is in the public interest and that disclosure may result in a re-assessment of this practice.

The Ministry submits that “full and frank discussions are essential for groups and stakeholders, such as the affected party [the appellant], to have meaningful input into the development and implementation of Ministry policies and programs”. The Ministry goes on to say that such voluntary input increases the quality and effectiveness of the Ministry’s policies and programs. The Ministry states that it is in the public interest that it continue to receive such input.

I have considered the parties’ representations. In my view, in situations where an institution is in ongoing dialogue with a stakeholder, the exercise serves the interests of both parties. In most circumstances there is a strong incentive for the stakeholder to provide its perspective to the institution with a view toward influencing the future direction of government policy. However, I accept that this is a voluntary exercise and that while there is a business agenda on the part of the stakeholder, there is also a public benefit in the Ministry’s ability to continue to receive information such as the results of the survey which are at issue in this appeal. Accordingly, I accept that disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the Ministry where it is in the public interest that similar information continue to be so supplied. Therefore, the third part of the test has been met for the highlighted portion of Record 3.

ORDER:

1. I order the Ministry to withhold access to the highlighted portion of page 3, Record 3 as shown on the copy of the record sent to the Ministry’s Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I uphold the Ministry’s decision on access with respect to the remaining records at issue in this appeal.
3. I order the Ministry to disclose the remaining records (Records 1 and 2 in their entirety and the non-highlighted parts of Record 3) to the requester by sending a copy by **December 28, 1998** but not earlier than **December 23, 1998**.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester pursuant to Provision 3.

Original signed by: _____
Mumtaz Jiwan
Adjudicator

November 23, 1998